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TECHNOLOGY AND TEEN SEX: THE NEED FOR LEGISLATIVE ACTION IN RESPONSE TO 'SEXTING'¹

I. INTRODUCTION

MaryJo Miller, mother of fourteen-year-old Marissa, was shocked to find her daughter faced possible felony child pornography charges, stemming from a photograph taken two years previously at a friend's slumber party.² The picture displayed Marissa from the waist up in an opaque bra.³ A lunchroom incident involving a teen⁴ boy displaying nude pictures of female classmates stored on his cell phone sparked the investigation leading to the scrutiny of Marissa's image.⁵ The investigation led to the discovery of similar images, such as one of a seventeen-year-old girl in a towel wrapped just below her breasts, resulting in numerous teens facing possible felony charges and sex offender registration.⁶

In 2009, numerous parents, school officials, and law enforcement officers discovered the meaning of "sexting," the conduct of sending sexually explicit photos via cell phone.⁷ The concept has become a cultural phenomenon,⁸ evidenced by the plots of the teen drama *90210*⁹ and *Law & Order: Special Victims Unit*.¹⁰ As entertaining as these story lines may seem, it is imperative not to lose sight of the real-life effects of felony sex convictions for teens.¹¹ Some debate the frequency and pervasiveness of sexting among teens.¹² However, there is no debating that the current state of child pornography laws provides law enforcement officers the discretion to charge America's youth with felony charges for sexting.¹³ Rampant teen cell phone usage,¹⁴ coupled with

1. The author would like to thank Professor Russell Christopher for his help in developing the subject matter of this comment.

2. Dionne Searcey, *A Lawyer, Some Teens and a Fight Over 'Sexting'*, WALL ST. J. (April 21, 2009), <http://online.wsj.com/article/SB124026115528336397.html>.

3. *Id.*

4. For purposes of this comment, "teen" refers to individuals eighteen-years-old and younger.

5. Searcey, *supra* note 2.

6. *Id.*

7. Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 2-3 (2009).

8. *Id.* at 3.

9. *90210: To Sext or Not to Sext* (CW television broadcast Sept. 15, 2009).

10. *Law & Order, Special Victims Unit: Crush* (ABC television broadcast May 5, 2009).

11. *See infra* notes 303-315 and accompanying text.

12. *See Sociologist: Few Teens 'Sexting'*, UNITED PRESS INT'L (Jan. 11, 2009), http://www.upi.com/Top_News/2009/01/11/Sociologist-Few-teens-sexting/UPI-78141231654189/ (discussing the skepticism some possess concerning the prevalence of sexting).

13. *See infra* notes 60-83 and accompanying text.

14. *See Cell Phones Key to Teens' Social Lives, 47% Can Text with Eyes Closed*, MARKETINGCHARTS.COM (Sept. 23, 2008), <http://www.marketingcharts.com/interactive/cell-phones-key-to-teens-social-lives-47-can-text-with-eyes-closed-6126/> (citing national survey conducted by CTIA and Harris Interactive).

the broad terms of child pornography statutes,¹⁵ unintentionally regulates teen sexual behavior.¹⁶ In light of the expansive state of sex offender registry laws, sexting charges can irreparably harm the lives of teens for decades, if not permanently.¹⁷

The recent trend to charge, or threaten to charge, teens for sexting under a state's child pornography laws is contrary to the legislative intent of the statutes, thus demonstrating the state's motivation is paternalistic; accordingly, child pornography laws require amendment to reflect the "Romeo and Juliet" exceptions to statutory rape and the intent of the teen producer. This comment first discusses the intent of child pornography laws and the recent rise of sexting. Application of this intent to sexting charges demonstrates the need for amendment of child pornography laws, based on the current state of statutory rape laws and the intent of the teen producer, due to the state's impermissible motives for charging teens with sexting.

II. BACKGROUND

A. Overview of Federal Legislation Defining Child Pornography

Congress' purpose in enacting laws criminalizing pornography was the prevention of exploitation and abuse of minors.¹⁸ Before 1988, Congress attempted to confront these concerns in two main ways: by banning all obscene pornography, regardless of the age of the subject, and by banning all pornography depicting minors.¹⁹

Congress first enacted the Protection of Children Against Sexual Exploitation Act ("Act") of 1977.²⁰ The Act was meant as a check on the rapidly growing child pornography industry,²¹ which Congress felt was harmful to children's "physiological, emotional, and mental health, as well as to the good of society as a whole."²² In enacting this legislation, which prohibited numerous aspects of child pornography, including production, possession, and transmission,²³ Congress noted this was the first time in its history to directly criminalize the exploitation of minors.²⁴ Congress stressed its purpose was not to reach the "private relations of individuals, or those of consenting minors or consenting adults," but to counteract the rapidly increasing commercial exploitation of minors.²⁵

In response to the Supreme Court's 1982 decision *New York v. Ferber*,²⁶ Congress noted the "national tragedy" that was the "tens of thousands of children under the age of 18 . . . believed to be filmed or photographed while engaging in sexually explicit acts for

15. See *infra* notes 60-83 and accompanying text.

16. See *infra* notes 165-190 and accompanying text.

17. See *infra* notes 303-315 and accompanying text.

18. Deborah F. Buckman, Annotation, *Validity, Construction, and Application of 18 U.S.C.A. § 2252(A)(a), Proscribing Certain Activities Relating to Material Constituting or Containing Child Pornography*, 2 A.L.R. Fed. 2d 533 (2005).

19. *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 324 (6th Cir. 2009).

20. Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C.A. § 2251 (West 1978).

21. Buckman, *supra* note 18, at 534.

22. *Id.* at 13 (citing S. REP. NO. 95-438, at 5 (1977), reprinted in 1978 U.S.C.C.A.N. 40).

23. *Id.*

24. 125 CONG. REC. H139 (daily ed. Jan. 24, 1978) (statement of Rep. Conyers).

25. *Id.*

26. *N.Y. v. Ferber*, 458 U.S. 747 (1982).

the producer's own pleasure or profit."²⁷ Consequently, Congress determined the 1977 Act needed amendment.²⁸ In *Ferber*, the Court examined, for the first time, the constitutionality of a statute criminalizing images of children engaged in sexually explicit conduct.²⁹

The Court determined the states' compelling interest³⁰ in protecting minors from commercial exploitation and abuse outweighed the need to protect child pornography under the First Amendment.³¹ Thus, the Court upheld a New York statute categorizing child pornography under a broader test than the general test for obscenity under *Miller v. California*.³² Although the Court afforded states more leeway in defining child pornography than obscenity in order to protect "the physiological, emotional, and mental health"³³ of children, it stressed the need that conduct prohibited by the statute be clearly and adequately defined.³⁴

The Child Protection Act of 1984 ("CPA") cited *Ferber*,³⁵ and the low number of prosecutions under the Act,³⁶ as a call to extend its coverage.³⁷ The amendments deleted the term "commercial purpose" from the legislation, attempting to reach those who coerced children to engage in sexually explicit conduct, but not necessarily for profit.³⁸

Under the existing Act, the prosecutor had to prove the subject's age was sixteen.³⁹ The difficulty was compounded given the subjects of the images were generally unable to be located.⁴⁰ Therefore, the CPA raised the age of protection from sixteen to eighteen

27. H.R. REP. NO. 98-536, at 492 (1983), *reprinted in* 1984 U.S.C.A.N. 492, 493.

28. *Id.*

29. *Ferber*, 458 U.S. at 753.

30. *Id.* at 757 (citing *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982)) (holding that the state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling"); *Prince v. Mass.*, 321 U.S. 158, 168 (1944) (holding that a statute prohibiting the use of a child to distribute literature on the street was valid despite the First Amendment implications).

31. *Id.* at 760 (citing David P. Shouvlín, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)) (explaining "pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography").

32. *Miller v. Cal.*, 413 U.S. 15, 24-5 (1973) (defining the test for obscenity as "(a) whether the 'average person' . . . would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value" (quoting *Roth v. U.S.*, 354 U.S. 476, 489 (1957) (rejecting the "utterly without redeeming social value" test of *Memoirs v. Mass.*, 383 U.S. 413, 419 (1966), as unworkable))). *Ferber* defines the test for child pornography as: "the trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *Ferber*, 485 U.S. at 764.

33. *Ferber*, 458 U.S. at 758 (quoting S. REP. NO. 95-438, at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40) (stating, "[T]he use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole.").

34. *Id.* at 764.

35. *Id.* at 774.

36. H.R. REP. NO. 98-536 at 493 (stating that since the statute's enactment only twenty-eight persons had been indicted under the Act).

37. *Id.* at 492-94.

38. *Id.* at 494.

39. *Id.*

40. *Id.* at 495.

to facilitate prosecution.⁴¹ Congress acknowledged its intention was to facilitate more effective prosecution of images of sixteen-year-olds and younger, not expansion of the images criminalized by the CPA.⁴²

Beginning in 1988, in light of technological developments, Congress amended the Act multiple times in response to the difficulties faced in policing the world of child pornography.⁴³ In order to keep up with technology, regulation of child pornography expanded based on the means of production, in addition to the content.⁴⁴ Congress expanded the means of production encompassed by the Act through the Child Protection and Obscenity Enforcement Act of 1988 (“CPOEA”).⁴⁵ CPOEA expanded the Act including the movement of child pornography “by any means including the computer.”⁴⁶ Subsequently, prosecution of child pornographers rose over 600 percent.⁴⁷

In 1996, the Child Pornography Prevention Act (“CPPA”) attempted to broaden the definition of child pornography to encompass virtual images of children.⁴⁸ The Supreme Court held two provisions of CPPA as unconstitutional infringements on the First Amendment in *Ashcroft v. Free Speech Coalition*.⁴⁹ The Court found that defining child pornography to include virtual images merely resembling minors encompassed additional images that were by no means harmful or abusive to children.⁵⁰ The interests involved in protecting First Amendment rights outweighed the benefits of endorsing the tenuous connection between the production of virtual pornography and child abuse.⁵¹ The fact that the virtual images “[did] not involve, *let alone harm*, any children in the production process” weighed heavily on the Court’s decision in finding the provisions overinclusive.⁵²

The Court discussed the realm of images covered that did not merit prosecution at length.⁵³ In citing the artistic value of many works banned under the CPPA, the Supreme Court noted, “[t]he statute proscribes the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art

41. H.R. REP. NO. 98-536 at 495.

42. *Id.* (stating, this expansion “facilitate[d] the prosecution of child pornography cases and raise[d] the effective age of protection of children from these practices, probably not to eighteen years of age, but perhaps to sixteen”).

43. Buckman, *supra* note 18, at 544.

44. *Id.*

45. *Id.* (citing Pub. L. No. 100-690, § 7511(b), 102 Stat. 4485, 4485 (1998)) (explaining, “This act was enacted as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §1, 102 Stat. 4181”); *see generally* Bradley Scott Shannon, *The Jurisdictional Limits of Federal Criminal Child Pornography Law*, 21 U. HAW. L. REV. 73 (1999).

46. Buckman, *supra* note 18, at 544 (citing Pub. L. No. 100-690, § 7511(b), 102 Stat. 4485, 4485).

47. 134 CONG. REC. E3750 (daily ed. Oct. 21, 1988) (statement of Hon. Hughes).

48. Victoria Broussard, *Ashcroft v. Free Speech Coalition: Legislators Push for Policy Direction to Protect the Age of Innocence While the Court Turns a Deaf Ear*, 29 T. MARSHALL L. REV. 419, 419-420 (2004) (citing 18 U.S.C.A. § 2256(8)(B) (West 2001) (defining pornography as “any visual depiction, including any photograph, film, video, picture, or computer or computer generated image,” that “is, or appears to be, of a minor engaging in sexually explicit conduct”) (emphasis added))) (held unconstitutional by *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002)).

49. *Free Speech Coal.*, 535 U.S. at 258 (holding §§ 2256(8)(B) and 2256(8)(D) substantially overbroad and in violation of the First Amendment).

50. *Id.* at 241 (explaining that by implication one could be prosecuted for owning a Renaissance painting).

51. *Id.* at 258.

52. *Id.* at 241 (emphasis added).

53. *Id.* at 247.

and literature throughout the ages.”⁵⁴ Under the statute’s broad sweep, films or books depicting stories such as *Romeo and Juliet* were obscene.⁵⁵ By designating the age of eighteen, the statute prohibited images of subjects who in many states were older than the legal age to marry and engage in consensual sexual relations.⁵⁶

In finding two provisions of CPPA overinclusive, the Court distinguished “teenage sexual activity” from “sexual abuse.”⁵⁷ The Court struck the statute down under *Ferber*, because as opposed to the speech in *Ferber*, “speech that in itself [was] the record of child abuse, the CPPA prohibit[ed] speech that record[ed] no crime and create[d] no victim by its production. Virtual child pornography [was] not ‘intrinsically related’ to the sexual abuse of children.”⁵⁸ In *Ashcroft v. Free Speech Coalition*, the Supreme Court clarified and reaffirmed *Ferber*’s main holding that although the government could define child pornography more broadly than obscenity in its attempted protection of child victims, speech that was neither obscene nor the product of child abuse still warranted considerable protection under the First Amendment.⁵⁹

B. State Laws Pertaining to Child Pornography

Although the definitions and elements concerning child pornography differ across jurisdictions,⁶⁰ every state currently has legislation aimed at criminalizing the production and dissemination of child pornography.⁶¹ The broad terms within these statutes enable

54. *Free Speech Coal.*, 535 U.S. at 246.

55. *Id.* at 247.

56. *Id.* (citing 18 U.S.C.A. § 2243(a) (West 2001)) (stating the age of consent in federal maritime and territorial jurisdiction as 16); NATIONAL SURVEY OF STATE LAWS 384-388 (Richard A. Leiter ed., 3d ed. 1999) (forty-eight states permit sixteen-year-olds to marry with parental consent).

57. *Free Speech Coal.*, at 247-48.

58. *Id.* at 250 (emphasis added) (citing *Ferber*, 458 U.S. at 759).

59. *Id.* at 251 (citing *Ferber*, 458 U.S. at 764-65).

60. Stephen F. Smith, *Jail for Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL’Y & L. 505, 513 (2008).

61. *Commonwealth v. Davidson*, 938 A.2d 198, 210 (Pa. 2007) (stating that as of 1990, only nineteen states had promulgated statutes criminalizing possession of child pornography, but as of 2007 all fifty states had statutes criminalizing child pornography); see ALA. CODE § 13A-12-192 (2009); ALASKA STAT. § 11.61.127 (West 2009); ARIZ. REV. STAT. ANN. § 13-3553 (2009); ARK. CODE ANN. § 5-27-304 (West 2009); CAL. PENAL CODE § 311.11 (West 2009); COLO. REV. STAT. § 18-6-403 (West 2009); CONN. GEN. STAT. § 53a-196d (West 2009); DEL. CODE ANN. tit. 11, § 1111 (West 2009); FLA. STAT. ANN. § 827.071 (West 2009); GA. CODE ANN. § 16-12-100 (West 2009); HAW. REV. STAT. § 707-752 (West 2009); IDAHO CODE ANN. § 18-507(A) (West 2009); 720 ILL. COMP. STAT. 5/11-20.1 (West 2009); IND. CODE ANN. § 35-42-44 (West 2009); IOWA CODE ANN. § 728.12 (West 2009); KAN. STAT. ANN. § 21-3516 (West 2008); KY. REV. STAT. ANN. § 531.335 (West 2009); LA. REV. STAT. ANN. § 14:81.1 (2008) (amended by 2009 La. Sess. Law Serv. 382 (West)); 17 ME. REV. STAT. ANN. tit. § 2911 (2009); MD. CODE ANN. CRIM. LAW § 11-208 (West 2009); MASS. GEN. LAWS ANN. ch. 272, § 29C (West 2009); MICH. COMP. LAWS ANN. § 750.154c (West 2009); MINN. STAT. ANN. § 617.247 (West 2009) (subd. 8 held unconstitutional in *State v. Cannady*, 727 N.W.2d 403 (Minn. 2007); MISS. CODE ANN. § 97-5-33 (West 2009); MO. REV. STAT. § 568.060 (West 2009); MONT. CODE ANN. § 45-5-625 (2008) (amended by 2009 Mont. Laws 198); NEB. REV. STAT. § 28-1463.05 (2009) (amended by 2009 Neb. Laws 97); NEV. REV. STAT. ANN. § 200.730 (West 2009); N.H. REV. STAT. ANN. § 649-A:3 (2009); N.J. STAT. ANN. § 2C:24-4 (West 2009); N.M. STAT. ANN. § 30-6A-3 (West 2009); N.Y. PENAL LAW §§ 263.11, 263.16 (McKinney 2009); N.C. GEN. STAT. ANN. § 14-190.17A (West 2009); N.D. CENT. CODE ANN. § 12.1-27.2-04.1 (West 2009); OHIO REV. CODE ANN. § 2907.321 (West 2009); OKLA. STAT. ANN. tit. 21, § 1024.2 (West 2009); OR. REV. STAT. ANN. §§ 163.686-163.689 (West 2009); 18 PA. CONS. STAT. ANN. § 6312 (West 2009); R.I. GEN. LAWS ANN. § 11-9-1.3 (West 2009); S.C. CODE ANN. § 16-15-410 (2008); S.D. CODIFIED LAWS § 22-24A-3 (2009); TENN. CODE ANN. § 39-17-1003 (West 2009); TEX. PENAL CODE ANN. § 43.26 (West 2009); UTAH CODE ANN. § 76-5a-3 (West 2009); VT. STAT. ANN. tit. 13, § 2827 (West 2009); VA. CODE ANN. § 18.2-374.1:1 (West 2009); WASH. REV. CODE ANN. § 9.68A.070 (West

juvenile prosecution for self-produced child pornography.⁶² For example, an Oklahoma child pornography law states,

*Every person who willfully and knowingly . . . writes, composes, stereotypes, prints, photographs, designs, copies, draws, engraves, paints, molds, cuts, or otherwise prepares, publishes, sells, distributes, keeps for sale, knowingly downloads on a computer, or exhibits any obscene material or child pornography . . . shall be guilty, upon conviction, of a felony.*⁶³

Juvenile prosecution for self-produced child pornography has only recently garnered significant attention.⁶⁴ However, there is appellate authority upholding a state's power to punish minors under child pornography laws for producing images of themselves.⁶⁵ In *A.H. v. State*, a Florida appellate court determined A.H.'s privacy rights were not violated when prosecuted for self-produced child pornography.⁶⁶ She faced prosecution for sending naked pictures over the internet to her boyfriend depicting sexual acts between them; she was sixteen, he was seventeen.⁶⁷ The defendant, A.H., argued that because the Florida Supreme Court had ruled sexual conduct between minors evoked constitutionally protected privacy rights under the Florida Constitution,⁶⁸ pictures of teenagers engaging in the same conduct sent over the internet warranted similar protection.⁶⁹

The court distinguished dissemination of sexually explicit pictures from sexual conduct, stating the pictures were prone to dissemination among many people and could lead to the minors' commercial exploitation.⁷⁰ The court noted constitutionally protected privacy rights depended on a reasonable privacy expectation.⁷¹ Minors engaging in documented immature sexually active relationships⁷² had no reasonable expectation that the sexually explicit photographs would remain discreet.⁷³ For this reason, the court concluded the state's compelling interest in preventing sexually explicit transmissions warranted the minor's prosecution.⁷⁴

The dissent of *A.H.* discussed potential flaws in the court's reasoning.⁷⁵ The court's premise rested on the belief that the minor's prosecution under the Florida child

2009); W. VA. CODE ANN. § 61-8C-3 (West 2009); WIS. STAT. ANN. § 948.12 (2009); WYO. STAT. ANN. § 6-4-303 (West 2009)).

62. Smith, *supra* note 60, at 513.

63. OKLA. STAT. ANN. tit. 21, § 1021.2 (West 2009) (emphasis added).

64. Smith, *supra* note 60, at 513.

65. *Id.* (citing *A.H. v. State*, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007)).

66. *A.H.*, 949 So. 2d at 235.

67. *Id.*

68. *Id.* at 236 (citing *B.B. v. State*, 659 So.2d 256, 260 (Fla. 1995)) (holding that although sexual abstinence is a worthy educational tool, teenage sexual activity is not worthy of second degree felony prosecution as it is constitutionally protected under privacy rights).

69. *Id.*

70. *Id.*

71. *A.H.*, 949 So. 2d at 236 (citing *Bd. of Cnty. Comm'rs of Palm Beach Cnty. v. D.B.*, 184 So.2d 585, 588 (Fla. Dist. Ct. App. 2001)).

72. *Id.* at 237.

73. *Id.*

74. *Id.* at 238-39.

75. *Id.* at 239.

pornography statute ultimately protected her from abuse.⁷⁶ However, the dissent noted the purported purpose of the statute was *protection* for minors;⁷⁷ in this case, the statute's effect was the protected class' *punishment*.⁷⁸ The dissenting opinion did not distinguish between minors engaging in sexual conduct and minors engaging in *documented* sexual conduct.⁷⁹ The court's decision to distinguish these two actions rested on multiple unsubstantiated conclusions, such as speculations concerning the ultimate demise of the romantic relationship and the inevitable dissemination of the photographs to third parties.⁸⁰ The dissent emphasized the minor's intent as the controlling factor in prosecution.⁸¹ Because an intention to disseminate the photographs to third parties did not exist,⁸² her right to privacy was reasonable, and thus should have been constitutionally protected.⁸³

C. The Rise of "Sexting"

Currently, four out of five teens possess a wireless device,⁸⁴ which is a forty-percent increase since 2004.⁸⁵ Nearly half of teens believe their social lives would vanish without their cell phones, and nearly sixty percent state their cell phones improve their quality of life.⁸⁶ Thirty-nine percent of teens send or receive text messages,⁸⁷ and admit to taking and sending pictures via text.⁸⁸

Sexting, a side effect of the sudden explosion in cell phone usage, leaves parents, teachers, and lawmakers in an unprecedented position.⁸⁹ Confronted with this new technological phenomenon,⁹⁰ law enforcement officers filed criminal charges against teens for sexting in Pennsylvania, Ohio, Michigan, Alabama, Wisconsin, Florida, New York, New Jersey, Connecticut, Texas, Utah, and other states.⁹¹ In Oklahoma, prosecutors have referred at least ten cases of self-produced child pornography to juvenile courts but have not yet filed charges in adult courts.⁹²

A recent survey by The National Campaign to Prevent Teen and Unplanned Pregnancy detailing sexting's pervasiveness⁹³ received much attention in light of

76. *A.H.*, 949 So. 2d at 239 (citing FLA. STAT. ANN. § 827.071(3) (West 2007)).

77. *Id.*

78. *Id.*

79. *Id.* at 240.

80. *Id.*

81. *A.H.*, 949 So. 2d at 240.

82. *Id.*

83. *Id.* at 241.

84. *Cell Phones Key to Teens' Social Lives*, *supra* note 14.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Caleb Johnson, *Vermont Teen Going to the Slammer for 'Sexting'*, SWITCHED.COM (Sept. 4, 2009, 1:36 PM), <http://www.switched.com/2009/09/04/vermont-teen-going-to-the-slammer-for-sexting/>.

90. *Id.* (stating that parents' and lawmakers' fears surrounding "sexting" lead to "crackdown" on prosecution).

91. Mathias H. Heck, Jr., *Sexting and Charging Juveniles—Balancing the Law and Bad Choices*, 43 PROSECUTOR Jan.-Mar. 2009, at 28.

92. Barbara Hoberock, *Legislator Taking Aim at Teen 'Sexting'*, TULSA WORLD, Oct. 30, 2009, at A13.

93. *See generally Sex and Tech: Results From a Survey of Teens and Young Adults*, THE NAT'L. CAMPAIGN

sexting's newfound prevalence.⁹⁴ Thirty-nine percent of the teen respondents admitted sending or posting "sexually suggestive" images via text, email, or instant message.⁹⁵ Of the teens that sent sexually explicit messages, seventy-one percent of females and sixty-seven percent of males sent them to their boyfriend or girlfriend.⁹⁶ Seventy-five percent of the teens believed that sending "sexually suggestive content [could] have serious negative consequences."⁹⁷

Pennsylvania teens Marissa Miller and Grace Kelly know the truth of this statement all too well.⁹⁸ In October 2008, Tunkhannock School District officials confiscated several student cell phones and discovered they contained pictures of female teenage students "scantily clad, semi-nude, and nude."⁹⁹ The School District gave the phones to George Skumanick, the District Attorney of Wyoming County, Pennsylvania.¹⁰⁰ Skumanick stated publically to local newspapers and parents at a school assembly that he could prosecute the teens under Pennsylvania's anti-child pornography statute,¹⁰¹ resulting in felony convictions for the teens.¹⁰² He also warned of probable sex offender registration for a period of at least ten years.¹⁰³

Skumanick sent letters to approximately twenty parents informing them their child was "identified in a police investigation involving the possession . . . of child pornography."¹⁰⁴ This letter promised the termination of charges if the teens entered a six to nine month "education and counseling" program.¹⁰⁵ Skumanick held a meeting with the parents at the county courthouse in February 2009, addressing the teens' options.¹⁰⁶ At the meeting, Skumanick discussed the inevitability of prosecution unless the "children submitted to probation, paid a \$100 program fee and completed the program successfully."¹⁰⁷

Parents at the meeting inquired into the nature of the photographs that warranted prosecution.¹⁰⁸ One parent asked directly why a picture of his daughter in a swimsuit

TO PREVENT TEEN AND UNPLANNED PREGNANCY (2008), available at <http://www.thenationalcampaign.org/sexttech>.

94. See *Sex and Tech: Selected Press*, THE NAT'L. CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, <http://www.thenationalcampaign.org/sexttech/press.aspx> (last accessed Oct. 17, 2009) (listing numerous news articles, television coverage, and radio coverage discussing "sexting" and the results of this survey).

95. *Sex and Tech: Results From a Survey of Teens and Young Adults*, *supra* note 93, at 1 (stating 1,280 people were surveyed, but only 653 of those were actually teens (ages 13-19), while the other 627 surveyed were young adults (ages 20-26)).

96. *Id.* at 2.

97. *Id.* at 3.

98. See *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009).

99. *Id.* at 637.

100. *Id.*

101. *Id.* (citing 18 PA. CONS. STAT. ANN. § 6312 (West 2009)) (defining "prohibited sexual act" as depicting "sexual intercourse . . . masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction").

102. *Id.* at 638.

103. *Miller*, 605 F. Supp. 2d at 638 (citing "Meghan's Law," 42 PA. CONS. STAT. ANN. § 9791 (West 2009)).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Miller*, 605 F. Supp. 2d at 638.

justified her prosecution for possession of child pornography.¹⁰⁹ Skumanick replied the girl's "provocativ[e]" pose warranted her prosecution.¹¹⁰ When the father pressed Skumanick to define "provocative" more precisely, he refused to discuss the matter and "reminded the crowd he could charge all the minors that night."¹¹¹ Skumanick added, "[T]hese are the rules. If you don't like them, too bad."¹¹²

Skumanick's proposed "re-education program" was divided into separate boys' and girls' programs.¹¹³ The program's purported purpose was to teach young girls "how their actions were wrong" and to "gain an understanding of what it mean[t] to be a girl in today's society, both advantages and disadvantages."¹¹⁴ A mandatory homework assignment included in the program's syllabus required the children to write "[w]hat [they] did" and "[w]hy it was wrong."¹¹⁵ Without showing the parents the allegedly "provocative" photos, Skumanick asked every parent at the meeting to sign a form submitting their children to probation and participation in the program.¹¹⁶ Only one parent signed the form.¹¹⁷ Skumanick gave the parents one week to comply with his request before pressing charges.¹¹⁸

When Marissa's and Grace's parents finally saw the picture of their daughters, they saw an image of two thirteen year old girls "from the waist up, each wearing a white, opaque bra."¹¹⁹ Grace was playfully making a peace sign, and Marissa was talking on the phone.¹²⁰ The other photo in question depicted a young girl ("Jane Doe") with a white, opaque towel wrapped around her body "just below her breasts."¹²¹ Despite the parents' repeated contention the photos did not depict sexual activity, Skumanick reiterated his threat to press felony child pornography charges based on the photos' "provocative" nature.¹²²

His belief the girls "allowed themselves to be photographed" was the sole basis for prosecution, dismissing the girls' contention they had no part in the dissemination of the photographs.¹²³ Eventually, all the parents succumbed to Skumanick's threats and entered their children into the program except Marissa's, Grace's, and Jane Doe's parents.¹²⁴ These parents filed a petition for a temporary restraining order ("TRO") in federal court to enjoin Skumanick from filing charges against their daughters, alleging that the threatened prosecution was retaliation for exercising their First and Fourteenth

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Miller*, 605 F. Supp. 2d at 638.

114. *Id.*

115. *Id.* (citing the course syllabus attached as an exhibit to the complaint).

116. *Id.*

117. *Id.*

118. *Miller*, 605 F. Supp. 2d at 639.

119. *Id.*

120. *Id.*

121. *Id.* The girl depicted was granted leave of court to remain anonymous. *Id.*

122. *Miller*, 605 F. Supp. 2d at 639.

123. *Id.*

124. *Id.* at 640.

Amendment rights in refusing to enter the “re-education” program.¹²⁵

First, the parents contended the non-obscene nature of the photographs afforded them protection under the First Amendment.¹²⁶ Second, the program’s forced admission of guilt, despite the fact the children did not violate a law, was impermissible compelled speech.¹²⁷ Lastly, the parents asserted Skumanick’s program violated their parental right to “control the upbringing of their children.”¹²⁸ Since the petition was for a TRO, the court considered whether the parents had a reasonable probability of success at trial, if the children would suffer irreparable injury if relief was denied, the nonmoving party’s possible stake in the outcome, and the public interest in granting the relief.¹²⁹

The court determined the parents and children had a reasonable chance of success on the merits because they sufficiently asserted constitutionally protected activities.¹³⁰ The program potentially infringed on the parents’ right to control the upbringing and education of their children,¹³¹ and the program’s requirement that the children write an essay concerning how their actions “affected the victim in the case” magnified the parental right infringement.¹³² In the parents’ eyes, their daughters were the “victims” as they did not disseminate the photos and accordingly did not deserve this lesson.¹³³

The children demonstrated a right to be free from government-compelled speech.¹³⁴ The program would force the children to explain the impermissible nature of their actions.¹³⁵ Because the photographs did not depict a “prohibited sexual act”¹³⁶ and because the children were arguably the victims of the offense, as they did not disseminate the pictures,¹³⁷ it was reasonably likely they would not face conviction for the child pornography offense.¹³⁸ The court determined the children would suffer irreparable harm in the event the TRO was not granted.¹³⁹ The irreparable harm was the “chilling effect” the “threat of prosecution” had on “plaintiffs expressing themselves by appearing in photographs, even such innocent photographs as those in bathing suits.”¹⁴⁰ The court found the plaintiffs met their burden and granted the TRO.¹⁴¹

While Marissa’s and Grace’s ordeal was not trivial by any measure,¹⁴² Ohio teen Jesse Logan felt sexting’s repercussions much more acutely.¹⁴³ Jesse sent nude pictures

125. *Id.*

126. *Id.*

127. *Miller*, 605 F. Supp. 2d at 640.

128. *Id.*

129. *Id.* at 641 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008)).

130. *Id.* at 644.

131. *Id.* (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Meyer v. Neb.*, 262 U.S. 390, 399 (1923)).

132. *Miller*, 605 F. Supp. 2d at 644.

133. *Id.*

134. *Id.* (citing *Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

135. *Id.*

136. *Id.* at 645 (citing 18 PA. CONS. STAT. ANN. § 6312 (West 2009)).

137. *Miller*, 605 F. Supp. 2d at 645-46.

138. *Id.* at 646.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Miller*, 605 F. Supp. 2d at 646 (citing the irreparable harm the threat of prosecution caused the teens).

143. Mike Celizic, *Her Teen Committed Suicide Over ‘Sexting’*, TODAYSHOW.COM (Mar. 6, 2009, 8:26 AM), <http://www.msnbc.msn.com/id/29546030>.

of herself to her boyfriend.¹⁴⁴ When they broke up, he sent them to their female classmates.¹⁴⁵ The ridicule that followed turned the vivacious young girl into a depressed and desperate teen.¹⁴⁶ She feared the daily name-calling of “slut” and “whore” so intensely that she became afraid to go to school and began skipping classes to avoid the inevitable fear and embarrassment.¹⁴⁷ In May 2008, Jesse went on a local television program to warn other teens about the consequences of sending nude photos to peers.¹⁴⁸ She wanted something positive to come out of her ordeal and “to make sure no one else [would] have to go through [her experience] again.”¹⁴⁹ Two months after Jesse’s television appearance, Jesse’s mother felt she was slowly returning to her old self.¹⁵⁰ Tragically, this was not to be.¹⁵¹ Jesse’s mother found her daughter’s body hanged in her closet after attending the funeral of a fellow classmate who also committed suicide.¹⁵²

As these cases demonstrate, there is research suggesting the production of sexting photos is more prominent among teenage girls, while the dissemination of the photos is more prominent among teenage boys.¹⁵³ One social psychologist, Dr. Arthur Cassidy, suggests the desire of young girls to mirror the images they see in fashion magazines coupled with the explosion of internet networking sites creates unprecedented pressure on young girls to present themselves as sexual objects.¹⁵⁴ The prevalence of teen access to camera phones creates a natural outlet for this sexual pressure.¹⁵⁵

D. Recent Legislative Actions in Response to Sexting

In 2009, many states took legislative steps to amend child pornography laws in response to sexting.¹⁵⁶ Lawmakers in Utah enacted legislation downgrading punishment for sexting from a third degree felony to a misdemeanor if the person disseminating the pornographic photographs is seventeen or younger.¹⁵⁷ Nebraska now affords an affirmative defense to minors in possession of sexually explicit images of children fifteen and older provided the images depict only one child, coercion did not produce the pictures, and dissemination of the photographs did not occur.¹⁵⁸

Specifically citing the recent Sex Offender Registration and Notification Act (“SORNA”) requiring substantial implementation by every state at the risk of losing

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Celizic, *supra* note 143.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Annalisa Barbieri, *You Don't Know What Sexting Is?*, THE GUARDIAN, (Aug. 7, 2009), <http://www.guardian.co.uk/lifeandstyle/2009/aug/07/sexting-teenagers-mobile-phones>.

154. *Id.*

155. *Cell Phones Key to Teens' Social Lives*, *supra* note 14.

156. Pam Greenberg, *Internet and Information Technology: States Act to Address 'Sexting'*, NAT'L CONF. OF STATE LEGISLATURES., <http://www.ncsl.org/?tabid=17822> (last accessed Nov. 1, 2009) (additionally discussing new legislation aimed at reaching adults luring minors through “sexting.”)

157. H.B. 97, 2009 Gen. Sess. (Utah 2009).

158. *Internet and Information Technology: States Act to Address 'Sexting'*, *supra* note 156 (citing Leg. 97, 101st Leg., 1st Reg. Sess. (Neb. 2009)).

funding.¹⁵⁹ Vermont moved minor adjudication for sexting to juvenile court to avoid sex offender registration.¹⁶⁰ The Vermont legislation also decriminalized minor possession of images of other minors, as long as the possessor attempted to destroy the image and did not send it to others.¹⁶¹ Ohio introduced similar legislation, creating a misdemeanor offense for minors convicted of sexting.¹⁶² The law states, “[n]o minor, by use of a telecommunications device, shall recklessly create, receive, exchange, send, or possess a photograph, video, or other material that shows a minor in a state of nudity.”¹⁶³ While Oklahoma has not yet enacted legislation addressing sexting, a hearing held in October of 2009 discussed the possible ramifications of sexting and the need for parental awareness and possible legislative change.¹⁶⁴

III. ANALYSIS

A. *Sexting Offenses Violate Statutory Intent of Child Pornography Statutes*

The recent rise of sexting among teenagers is a serious issue underscoring disturbing developments in the lives of teenagers.¹⁶⁵ The relevant question is whether the severe punishment under current child pornography laws,¹⁶⁶ enacted in response to specific egregious acts of child abuse,¹⁶⁷ is an appropriate response to teen-produced sexual images sent to a significant other of similar age and maturity.¹⁶⁸ When first confronted with the rapidly growing child pornography industry,¹⁶⁹ Congress noted its intent in enacting legislation confronting this disturbing phenomenon was counteraction of the “commercial exploitation” of minors, not the private conduct of “consenting minors or consenting adults.”¹⁷⁰

After the Supreme Court in *Ferber* approved a more expansive definition of child pornography than obscenity,¹⁷¹ Congress greatly expanded its child pornography legislation.¹⁷² The deletion of the term “commercial purpose” allowed for prosecution of producers who did not have commercial intentions.¹⁷³ Congress expanded the amount of teen sexting images that warrant prosecution by raising the age of the protection under the Act from sixteen to eighteen.¹⁷⁴ The amendment’s intention was not expansion of

159. 42 U.S.C.A §§ 16901-16917 (West 2006).

160. Sen. 125, 2009 Reg. Sess. 1 (Vt. 2009).

161. *Id.* at 6.

162. S. 103, 128th Gen. Assemb., 2009-2010 Reg. Sess. (Ohio 2009); H. 132, 128th Gen. Assemb., 2009-2010 Reg. Sess. (Ohio 2009).

163. *Id.*

164. Hoberock, *supra* note 92, at A11

165. Smith, *supra* note 60., at 515.

166. *Id.*

167. Buckman, *supra* note 18, at 543 (citing S.. REP. NO. 95-438, at 5).

168. Smith, *supra* note 60., at 515-16.

169. Buckman, *supra* note 18, at 543.

170. 95 CONG. REC. H139 (emphasis added).

171. *N.Y. v. Ferber*, 458 U.S. 747, 758 (1982).

172. H.R. REP. NO. 98-536 at 492-94.

173. *Id.* at 493-94.

174. *Id.* at 496.

protection to older teens,¹⁷⁵ but merely facilitation of adult prosecutions, made difficult under the previous Act by the requirement of proving the age of an often-absent subject as sixteen or under.¹⁷⁶

While Congress accomplished its goal of raising child pornography prosecutions¹⁷⁷ it could not have intended the Act, and state laws modeled after it,¹⁷⁸ to facilitate the prosecution of self-produced teen sexting images.¹⁷⁹ However, because the Act raised the age of protection to encompass images of older teens as well as younger teens, the overall pool of teens vulnerable to prosecution for voluntary, self-produced images expanded as well.¹⁸⁰ Furthermore, in sexting cases the minor charged with production of the image is also the subject of the image, and therefore is obviously present throughout the proceedings.¹⁸¹ Thus, Congress' reasons for raising the age of protection do not translate to sexting prosecutions of minors.¹⁸²

After given the authority to expand the definition of child pornography,¹⁸³ Congress specifically cited situations where the subject of the images and the producer of the images were separate individuals, as the impetus for increasing protection under the Act.¹⁸⁴ The Court also referenced the harmful effects of the production of child pornography at the hands of an adult in striking down the Act's inclusion of virtual images.¹⁸⁵ Because the *process* of producing virtual child pornography did not harm any children,¹⁸⁶ the First Amendment shielded the virtual images from prosecution.¹⁸⁷ Therefore, unless coerced into producing a sexting image, teen prosecution for production of the image is unwarranted.¹⁸⁸ The Court in *Free Speech Coalition* further distinguished the production of harmful images from the production of images depicting an idea embodying a "fact of modern society and . . . a theme in art and literature

175. *Id.* at 505 (explaining the Act would most likely not reach images of eighteen year olds due to the difficulty in proving the age of the subjects, but would merely facilitate prosecution of images of children sixteen and younger).

176. *Id.*

177. 134 CONG. REC. E3750 (stating prosecution of child pornography rose 600 percent in response to the expansion of the Act).

178. See *supra* note 61 (citing all fifty states' child pornography laws, most of which passed after the federal laws criminalizing child pornography, and nearly all listing eighteen as the age of protection).

179. See 134 CONG. REC. E3750.. By raising the age of protection to eighteen, the amount of teens covered by the Act expanded to enable prosecution for older teens as well as younger teens. See *id.*

180. See H.R. REP. NO. 98-536. By raising the age of protection to eighteen, the amount of teens covered by the Act expanded to enable prosecution for older teens as well as younger teens.

181. See *id.* at 494 (stating under the pre-amendment Act prosecutors had to prove to the jury the age of the subject was sixteen or less because the subject was generally not known or locatable due to the images' commercial nature).

182. See *Miller v. Skumanick*, 605 F. Supp. 2d 634, 639 (M.D. Pa. 2009) (describing images produced by the teen girls).

183. See *N.Y. v. Ferber*, 458 U.S. 747, 761 (1982) (citing *Miller v. Cal.*, 413 U.S. 15, 24-55 (1973)) (explaining a broader definition of obscenity is warranted for minors due to the physical and psychological abuse attributed to child pornography produced at the hand of an adult).

184. H.R. REP. NO. 98-536, at 492 (stating children filmed engaging in sexual acts "for the producer's own pleasure or profit" was a "national tragedy").

185. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 241-2 (2002).

186. *Id.*

187. *Id.* at 258.

188. See *Miller v. Skumanic*, 605 F. Supp. 2d 634 (M.D. Pa. 2009). None of the teen images found on the teenagers' phones were described as "coerced." *Id.*; See Celizic, *supra* note 143. Jesse voluntarily produced the images she sent to her boyfriend. *Id.*

throughout the ages,” the idea of “teenagers engaging in sexual activity.”¹⁸⁹

The Court emphasized most states allow marriage below the age of eighteen, thus the Act criminalized the depiction of an act which, when consensual, was legal in most states.¹⁹⁰ Because the virtual images “creat[ed] no victim by [their] production,” they were not intertwined with the “sexual abuse of children,” and thus constitutionally protected.¹⁹¹ Similarly, the dissemination of sexting images, not their voluntary production, is what victimizes the teen subjects,¹⁹² therefore, the First Amendment shields teens from criminal prosecution for merely producing the images.¹⁹³ When sexting images are not obscene, as the images in *Miller*, the First Amendment indisputably provides protection as their production is legal.¹⁹⁴

B. *The State’s Purpose in Charging Teens for Producing Sexting Images*

Exploring the state’s reasoning behind teen prosecution for child pornography offenses is imperative, as the purpose is not mitigating harm caused to children through the production of child pornography by adult coercion.¹⁹⁵ In recent years, extensive “advocacy, funding, and programmatic effort have focused on encouraging Americans to abstain from sexual intercourse until they marry.”¹⁹⁶ The Personal Responsibility and Work Opportunity Reconciliation Act (“Welfare Reform Act”), enacted in 1996, authorized fifty million dollars a year for abstinence-until-marriage education.¹⁹⁷ The education programs endorsed by the Welfare Reform Act had to promote sexual abstinence outside of marriage as their sole purpose.¹⁹⁸ Congress required programs funded by the Welfare Reform Act teach that pre-marital sex created detrimental physical and psychological effects in its participants.¹⁹⁹

These programs sought to reduce teen sexual activity in response to the reported seventy percent of females, and sixty-five percent of males, engaging in sexual activity by age nineteen.²⁰⁰ Despite opinion polls that registered only thirty-five percent of adults

189. *Free Speech Coal.*, 535 U.S. at 246.

190. *Id.* at 247.

191. *Id.* at 250 (emphasis added).

192. *See Celizic*, *supra* note 143 (Jesse did not suffer embarrassment and the resulting depression from the production of the images, but the dissemination of the images to her classmates); *see Miller*, 605 F. Supp. 2d at 644. The court granted the TRO in part due to parents’ belief their daughters were made “victims” by the dissemination of the photographs, not the production; especially in light of the non-obscene nature of the photographs. *Id.*

193. *See Free Speech Coal.*, 535 U.S. at 250-1. The abusive *production* of the images was emphasized by the Court. *Id.*

194. *See Miller*, 605 F. Supp. 2d at 645 (citing 18 PA. CONS. STAT. ANN. § 6312) (defining “prohibited sexual act” as depicting “sexual intercourse . . . masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction”).

195. *See supra* notes 165-194 and accompanying text (demonstrating prosecution of teens for producing sexting images violates the statutes’ intent, as the intent is to mitigate the child abuse that results from child pornography produced by adults).

196. Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954-2003*, 122 PUB. HEALTH RPT. Jan.-Feb. 2007, at 73, 74.

197. *Id.* at 74 (citing Pub. L. No. 104-193, § 912, 110 Stat. 2105 (1996)).

198. *Id.*

199. *Id.*

200. *Id.*

felt premarital sex was always or almost always wrong, Congress continued to promote its single-minded intent to abolish all pre-marital sex as immoral and wrong.²⁰¹

The internet and technology explosion of the late nineties made policing teen interactions increasingly difficult.²⁰² Approximately eighty-seven percent of teens use the internet and sixty-four percent of those teens belong to social networking sites or blogs on which they post pictures of themselves.²⁰³ Teens tend to use the invisible wall created by technology between the sender and recipient as a means to experiment with their sexuality.²⁰⁴ Sexting embodies this desire to experiment sexually,²⁰⁵ and accordingly frustrates Congress' desire to condemn all sexual activities outside of marriage as morally unacceptable.²⁰⁶ By prosecuting teens for sexting, states are furthering the belief that sexual interaction among teens is wrong.²⁰⁷ This takes advantage of a veritable "loop hole" in child pornography laws enabling regulation of the increasingly private technological interactions among teens.²⁰⁸

C. *Alternatives to Criminal Charges*

Charging teens with child pornography offenses for the production of sexting images serves to victimize them, not protect them.²⁰⁹ Because the intent of child pornography laws is protection of inexperienced and vulnerable minors from sexual exploitation,²¹⁰ it is important to teach children the dangers of sexual exploitation, rather than punish them for sexual experimentation.²¹¹ The topic of sex education invites political discourse surrounding the proper role of the government versus the family in educating teens about sexual issues.²¹² However, as sexting demonstrates, it is indisputable that teens are involved in sexual interactions.²¹³ Therefore, sex education regarding both moral implications and health concerns is required.²¹⁴

As *Miller* suggests, parents, not the state, are the preferred instructors for education

201. *Finer, supra* note 196, at 74.

202. *See* Caitlin May, Comment, "Internet-Savvy Students" and Bewildered Educators: Student Internet Speech Is Creating Legal Issues for the Educational Community, 58 CATH. U. L. REV. 1105, 1106 (explaining the surge in legal issues concerning "student internet speech").

203. *Id.* at 1105.

204. *See* Bruce Bower, *Growing Up Online: Young People Jump Headfirst into the Internet's World*, 179 SCI. NEWS, June 17, 2006, at 376, 377 (June 17, 2006) (discussing teen inclination to talk about sexual issues in chat rooms).

205. *See id.* (explaining technology's role in promoting sexual expression among teens). "Sexting" is an extension of the feeling of anonymity and excitement teens feel when discussing sex in chat rooms. *See id.*

206. *Finer, supra* note 196, at 74.

207. *See id.*

208. *See* OKLA. STAT. ANN. tit. 21, § 1021. This statute is typical of the vast majority of child pornography statutes in stating every person in possession of child pornography is guilty of a felony. *Id.* (emphasis added).

209. *See* A.H. v. State, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007) (Padovano, J., dissenting).

210. *See* S. REP. NO. 95-438, at 5.

211. *See* Ronny A. Shtarkshall, John S. Santelli & Jennifer S. Hirsch, *Sex Education and Sexual Socialization: Roles for Educators and Parents*, 39 PERSP. ON SEXUAL AND REPROD. HEALTH, June 2007, at 116, 116 (explaining the important role sexual education and socialization plays in a child's upbringing).

212. *Id.*

213. *See* Smith, *supra* note 60, at 508-9 (discussing the issues surrounding teen-produced child pornography and the prevalence of teens sexual interactions).

214. *See* Shtarkshall et al., *supra* note 211, at 116.

concerning the moral implications surrounding sexual interactions.²¹⁵ “Sexual socialization,” in contrast to sexual education, concerns the learning of beliefs, norms, values, and proper codes of conduct surrounding sexual interactions.²¹⁶ Children model their sexual behavior after the sexual ideals and beliefs taught to them informally in their home environment.²¹⁷ Teens who describe their relationships with their parents as “warm and supportive” tend to postpone sexual interactions.²¹⁸ Further, teens whose parents disapprove of teen sexual behavior are less likely to be sexually active.²¹⁹

Ideally, the home should be the primary source of education concerning sexual mores and conduct.²²⁰ However, as technology and mass media continue to rise in popularity, teens are looking to other outlets for models of appropriate sexual behavior.²²¹ Sexting is a glaring example of this.²²² As Dr. Cassidy suggests, teen girls especially look to the sexual images portrayed by the media as models for their sexual behavior.²²³ Sexting is a wake-up call to parents to resume their rightful place as the appropriate models of sexual conduct and to become more active in their teens’ lives.²²⁴

The most obvious outlet through which parents can deter the rise of sexting is to limit the usage of their teens’ cell phones.²²⁵ Most major cell phone providers offer tools that allow parents to either limit the amount of texts teens are able to send, or to monitor the content of such communication at a minimal cost.²²⁶ While these tools can deter the conduct by instilling fear of parental punishment,²²⁷ open communication and positive familial models concerning appropriate sexual behavior is preferable.²²⁸

Besides the prevalence of the media,²²⁹ another impediment to teen education within the home environment concerning sexual behavior is the discomfort felt by teens at the thought of discussing sex with their parents.²³⁰ Parents, especially fathers, share this sentiment.²³¹ This mutual feeling of unease bolsters the need for sex education in schools.²³² A school’s prominent role in regulating sexting offenses also magnifies the need for continued diligence by school administrators concerning sex education.²³³ The

215. *Miller v. Skumanic*, 605 F. Supp. 2d 634, 644 (M.D. Pa. 2009).

216. *Shtarkshall et al.*, *supra* note 211, at 116.

217. *Id.*

218. *Id.* at 117.

219. *Id.*

220. *Id.* at 116.

221. *Shtarkshall et al.*, *supra* note 211, at 116.

222. *See supra* notes 202-8 and accompanying text (describing the impact the technological explosion has had on regulating teen interactions).

223. *See Barbieri, supra* note 153.

224. *See Shtarkshall et al.*, *supra* note 211, at 117 (explaining that teens who have close relationships with their parents are less likely to be sexually active).

225. *See Parental Controls on Cell Phones*, SPAM LAWS, <http://www.spamlaws.com/parental-cell-phone-control.html> (last accessed Nov. 14, 2009).

226. *Id.* (citing sexting as an impetus behind these tools).

227. *Id.* (stating the purpose of these tools is to monitor teen behavior). Presumably, the purpose of the monitoring is to be able to punish the teens in the event sexual images are found. *Id.*

228. *See Shtarkshall et al.*, *supra* note 211, at 116.

229. *See Barbieri, supra* note 153.

230. *See Shtarkshall et al.*, *supra* note 211, at 117.

231. *Id.*

232. *Id.*

233. *See Miller v. Skumanic*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009) (stating the pictures at issue were all

need for familial education concerning the subjective moral implications of sexual interactions, and the need for school education of the objective health risks, demonstrates a shared obligation between parents and schools.²³⁴ Criminal punishment of teens for sexting is an ineffective and inappropriate method to teach socially acceptable sexual behavior compared to education by parents and teachers.²³⁵ Therefore, the state should concede sex education to parents and schools and focus on punishing adults who exploit minors, the intended perpetrators of child pornography laws.²³⁶

This is not to say law enforcement should play no role in mitigating sexting.²³⁷ The need for parental and school involvement as opposed to criminal charges pertains solely to teens that voluntarily produce images of themselves and disseminate them to a single person.²³⁸ Threatening criminal charges is completely appropriate to convince teens to desist from sending the sexually explicit images to multiple individuals.²³⁹ For example, teens such as Jesse Logan's boyfriend are entirely worthy of criminal punishment, but Jesse herself most certainly was not.²⁴⁰

Law enforcement can deter sexting by educating teens about the possible criminal sanctions involved in sexting.²⁴¹ As Ohio prosecutor Mathias Heck explains, most teens that produce and send sexting messages simply are unaware of the criminal repercussions surrounding their decisions.²⁴² In March of 2009, Heck's county introduced a program specifically aimed at juvenile sexting offenders.²⁴³ The six-month "diversion program" requires teen participants of sexting to relinquish their cell phones, participate in community service, and take four hours of educational courses concerning the appropriate and legal use of the internet and related topics.²⁴⁴ While programs such as these are a welcome alternative to criminal charges, prosecutors must take into account the lessons learned from *Miller*.²⁴⁵ These programs must focus on the legal ramifications of sexting and not the state's beliefs concerning the appropriateness of gender roles and teen sex.²⁴⁶ Due to the paternalistic motives behind teen sexting charges²⁴⁷ and the need for parental and educational responsibility in response to the

confiscated from cell phones at school); see May, *supra* note 202, at 1106-7 (describing the implications of the increased presence of internet communications on school campuses).

234. Shtarkshall et al., *supra* note 211, at 117.

235. See Eric J. Segall, *Internet Indecency and Minors: The Case for Parental and School Responsibility Not Congressional Regulation*, 110 PENN ST. L. REV. 615 (2006).

236. See *supra* notes 165-194 and accompanying text (describing child pornography laws' intended purpose was punishment of adults who exploit minors).

237. Smith, *supra* note 60, at 541.

238. See *id.* at 541-542 (discussing the need for criminal punishment only those teens that refuse to cooperate with law enforcement in destroying the images).

239. *Id.*

240. See Celizic, *supra* note 143.

241. See Heck, *supra* note 91, at 29.

242. *Id.*

243. *Id.*

244. *Id.*

245. See *Miller v. Skumanic*, 605 F. Supp. 2d 634, 643-4 (M.D. Pa. 2009) (stating the "re-education" program impermissibly infringed on parental rights to educate their children).

246. See *id.*

247. See *supra* notes 195-208 and accompanying text (explaining the government's intentions in charging teens for sexting is mitigation of pre-marital sex, not child abuse).

sexting phenomenon,²⁴⁸ state child pornography laws require amendment.²⁴⁹

D. SORNA's Effect on Convictions of Minors

1. SORNA's Expansive Reach

The recent enactment of SORNA, the national sex offender registry,²⁵⁰ bolsters the need for legislative change to state child pornography laws.²⁵¹ John Walsh, an invaluable advocate for missing children and unsolved crime, has orchestrated the enactment of numerous laws aimed at child protection and sex offender registry.²⁵² One example of this activism, The Adam Walsh Child Protection and Safety Act, became federal law on July 27, 2006.²⁵³ Additionally, this came with its most controversial and significant provisions, SORNA.²⁵⁴

Initially, all fifty states were individually required under SORNA to implement procedures creating a national sex offender registry by July 27, 2009, or lose ten percent of its allocated Byrne Justice Assistance Grant funds²⁵⁵ for each year it did not comply.²⁵⁶ On May 26, 2009, the Attorney General granted a blanket extension to all jurisdictions for substantial implementation of the terms of SORNA until July 27, 2010.²⁵⁷ As of October 2009, Ohio and the Confederated Tribes of the Umatilla Indian Reservation (located in Oregon) were the only two jurisdictions in substantial compliance with SORNA.²⁵⁸ Upon this bill's signature in 2006, President Bush explained the necessity for compiling a public national database of sex offenders.²⁵⁹ Such a database enabled "parents to protect their children from sex offenders that might be in their neighborhoods" when these offenders moved across state lines.²⁶⁰

Despite the implementation costs for states, and the already existing sex offender registry statutes, states are required to impose these restrictions at the risk of losing necessary funding.²⁶¹ SORNA creates a national sex offender registry by implementing a three-tiered system of classification for offenders who are required to register.²⁶² Tier I

248. See *supra* notes 210-34 and accompanying text (describing the parental and educational alternatives that could mitigate sexting).

249. See *supra* notes 60-5 and accompanying text (stating the vast majority of child pornography laws contain language broad enough to encompass sexting offenses, therefore amendment is necessary).

250. 42 U.S.C.A. §§ 16901-16917.

251. See Smith, *supra* note 60, at 536.

252. Anthony V. Salerno & Elana Goldstein, *Predators' Net: Implementation of the Adam Walsh Act Raises Fundamental Questions of Constitutional Rights*, L.A. LAWYER, June 2009, at 32.

253. 42 U.S.C.A. § 16901.

254. Salerno & Goldstein, *supra* note 252, at 32 (citing 42 U.S.C.A. §§ 16901-16917).

255. *Id.* (explaining these grants generally apply to law enforcement and drug laws).

256. *Id.*

257. *Adam Walsh Child Protection and Safety Act*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=12696> (last updated Sept. 30, 2009).

258. *Id.*

259. Presidential Statement on Signing the Adam Walsh Child Protection and Safety Act of 2006, 2006 U.S.C.C.A.N. S35, S36 (July 27, 2006).

260. *Id.*

261. Salerno & Goldstein, *supra* note 252, at 32.

262. *Id.* (citing Pub. L. No. 109-248, § 111, 120 Stat. 587, 591 (2006)).

offenders are the least offensive sex offenders.²⁶³ The term Tier I offenders are merely defined as those offenders that are neither Tier II nor Tier III, and are required to register for fifteen years, with renewal once per year.²⁶⁴ Tier II offenders are generally felons convicted of numerous sexual offenses, including production and distribution of child pornography.²⁶⁵ These offenders must register for twenty-five years, with renewal every six months.²⁶⁶ Tier III offenders are the most serious of the sexual offenders convicted of the most egregious sexual offenses.²⁶⁷ Also included in this category are repeat Tier II offenders.²⁶⁸ Tier III offenders are required to register for life at a renewal rate of every three months.²⁶⁹

Section 111 of AWA details the applicability of SORNA's sex offender registration to juvenile offenders adjudicated delinquent of a sex offense.²⁷⁰ This section mandates that juvenile offenders, who are fourteen years or older at the time of conviction of an offense "comparable to or more severe than aggravated sexual abuse, . . . or [who have] [attempted] or [conspired] to commit such an offense," are required to register as sex offenders.²⁷¹

Although at first glance it does not appear AWA includes juveniles found delinquent for possession or dissemination of child pornography, AWA allows states considerable leeway in determining who will be required to register.²⁷² Additionally, this discretion can affect minors charged with sex offenses by altering state laws pertaining to juvenile documents.²⁷³ These guidelines set the minimum requirements a state must follow, meaning states can use this federal law to expand registry laws they already have in place.²⁷⁴ Furthermore, the pressure placed on states to adopt these guidelines at the risk of losing funding²⁷⁵ compromises the privacy of juvenile records.²⁷⁶

Additionally, there is no assurance to minors that juvenile court is the proper venue for charges brought against them.²⁷⁷ Furthermore, even if charges are initially filed in juvenile court, minors can find themselves transferred to criminal court during the

263. *Id.*

264. *Id.*

265. *Id.* at 33 (citing Pub. L. No. 109-248, § 111).

266. Salerno & Goldstein, *supra* note 252, at 33 (citing Pub. L. No. 109-248, § 111).

267. *Id.* (citing Pub. L. No. 109-248, § 111) (describing tier three offenders as offenders generally convicted of an offense comparable to aggravated sexual abuse, sexual abuse, or abusive sexual contact against a minor under age 13).

268. *Id.* (citing Pub. L. No. 109-248, § 111).

269. *Id.* (citing Pub. L. No. 109-248, § 111).

270. *Juvenile Offenders Required to Register Under SORNA: A Fact Sheet*, U.S. DEP'T OF JUSTICE, http://www.ojp.gov/smart/pdfs/factsheet_sorna_juvenile.pdf (last accessed Sept. 24, 2009).

271. *Id.*

272. *Id.* The provisions expand already existing state sex offender registry laws by superseding previous state laws that may have more rigid guidelines for defining who will be required to register. *Id.*

273. *Id.* (stating an offense need only be "comparable to" an offense of "aggravated sexual abuse").

274. *Id.* These standards are being imposed on states, and could have the effect of broadening a state's previously restrictive statutes concerning who is required to register as a sex offender. *Id.*

275. Salerno & Goldstein, *supra* note 252, at 32.

276. See Martha T. Moore, *Sex Crimes Break the Lock on Juvenile Records*, USATODAY.COM, http://www.yellodyno.com/pdf/Juvenile_Sex_Offenders_USATODAY.pdf (last updated July 10, 2006, 10:57 PM) (explaining how national law making failure to register a felony (SORNA) will override state laws that attempt to shield juvenile records from the public).

277. Smith, *supra* note 60, at 533-4.

duration of their proceedings.²⁷⁸ In both state and federal courts, prosecutors have the option to request a removal from juvenile court to criminal court, and some states can avoid juvenile court entirely by initially filing charges against minors in criminal court.²⁷⁹ If criminal court is the chosen venue for minors charged with sexting offenses, SORNA's provisions will make sex offender registration mandatory for such teens.²⁸⁰ As discussed previously, the overwhelming majority of state child pornography laws proscribe felony charges to *any* person in possession of child pornography,²⁸¹ thus under SORNA, minors convicted in criminal court for sexting offenses would be required to register for a minimum of twenty-five years as sex offenders.²⁸²

Many circuit court opinions have addressed the constitutionality of 18 U.S.C. § 2250(a), which makes it a felony to fail to register as a sex offender as defined by SORNA.²⁸³ The Attorney General was delegated the task of determining SORNA's retroactive application to offenders convicted before the statute's effective date.²⁸⁴ However, no guidelines accompanied the implementation of this decision.²⁸⁵ The Attorney General determined the requirements of SORNA applied to "all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [the] Act."²⁸⁶

Prior to September 2009, all circuit courts had rejected claims that the provision

278. *Id.*

279. *Id.* at 534 (citing 18 U.S.C.A. §5032 (West 1996) ("granting federal district court judges broad discretion, in the interests of justice, to allow juveniles to be prosecuted as adults in federal court")); see *National Overviews: Which States Try Juveniles as Adults and Use Blended Sentencing?*, NAT'L CTR. FOR JUVENILE JUSTICE, <http://www.ncjj.org/stateprofiles> (select "Trying and Sentencing Juveniles as Adults" in the "National Overviews" drop down box; then select the hyperlink for the article) (last accessed Nov. 20, 2009) (stating, "Thirty-eight states allow for the possibility that minors will be prosecuted as adults on any felony charge; twenty of those go even farther, permitting minors to be prosecuted in criminal court for misdemeanors as well).

280. Pub. L. No. 109-248, § 111 (persons convicted of felony child pornography convictions are Tier II offenders).

281. See *supra* note 61 (listing state child pornography laws which proscribe felony charges to any person convicted of possession of child pornography).

282. Pub. L. No. 109-248, § 111.

283. Corey Rayburn Yung, *One of These Laws is Not Like the Others: Why the Federal Sex Offender Registry and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 384-5 (2009) (citing 18 U.S.C.A. § 2250 (West 2006); *U.S. v. Dixon*, 551 F.3d 578, 586-587 (7th Cir. 2008) (holding defendant was required to register in Indiana even though Indiana had not established the SORNA procedures, Congress did not violate separation of powers when it delegated to the Attorney General authority to specify SORNA's applicability, defendant's conviction did not violate due process, and defendant's second conviction did not violate Ex Post Facto Clause); *U.S. v. May*, 535 F.3d 912, 920 (8th Cir. 2008) (holding registration requirements applied to defendant and this did not violate Ex Post Facto Clause, defendant lacked standing to challenge SORNA provision giving authority to the Attorney General to promulgate rules regarding SORNA, his conviction did not violate due process, and SORNA did not violate the Commerce Clause) (8th Circuit subsequently affirmed its judgment in May and found § 16913 constitutional under the Commerce Clause in *U.S. v. Howell*, 552 F.3d 1329 (8th Cir. 2009)); *U.S. v. Hinkley*, 550 F.3d 926, 940 (10th Cir. 2008) (holding SORNA did apply to defendant, SORNA did not violate Ex Post Facto Clause or the Commerce Clause); *U.S. v. Ambert*, 561 F.3d 1202, 1215 (11th Cir. 2009) (holding the application of the provisions making it a crime not to register under SORNA did not violate the Ex Post Facto provision of the Constitution, did not violate defendant's substantive or procedural due process rights, SORNA did not exceed Congress' authority under the Commerce Clause, and the provision giving the Attorney General the authority to determine the retroactive application of the Act was not an improper delegation of legislative authority)).

284. 42 U.S.C.A. § 16913(d).

285. Yung, *supra* note 283, at 382.

286. *U.S. v. Juvenile Male*, 581 F.3d 977, 982 (9th Cir. 2009) (citing 28 C.F.R. § 72.3 (2007)).

violated the Ex Post Facto Clause of the Constitution.²⁸⁷ But on September 10, 2009, deciding an issue of first impression, the Ninth Circuit determined the retroactive application of SORNA's provision concerning juvenile registration of convictions prior to SORNA's passage,²⁸⁸ was an impermissible violation of the Ex Post Facto Clause.²⁸⁹ The opinion highlighted the reasoning behind the juvenile justice system,²⁹⁰ and the far-reaching implications sex offender registry imposed on juveniles for the entirety of their adult lives.²⁹¹ SORNA's recent addition intensified these far-reaching implications by broadening previously discreet state and federal juvenile proceedings.²⁹²

The court stated, "[a]s a society, we generally refuse to punish our nation's youth as harshly as we do our fellow adults, or to hold them to the same level of culpability as people who are older, wiser, and more mature."²⁹³ It determined the statute's effect was punitive when applied retroactively to juveniles.²⁹⁴ The practice of near absolute confidentiality that historically attached to juvenile proceedings,²⁹⁵ in which the proceedings were generally closed and records sealed,²⁹⁶ weighed heavily on the court's determination that SORNA's effects were punitive.²⁹⁷ This was because the hallmark of juvenile proceedings was rehabilitation, as opposed to the punitive nature of adult criminal proceedings.²⁹⁸

Before SORNA's passage, open juvenile proceedings or released documents, which were sparse,²⁹⁹ could not publicly disclose the juvenile's "identity" or "image."³⁰⁰ SORNA did not merely make previously public information more accessible

287. See Yung, *supra* note 283. In reaching this conclusion, the circuit courts relied on *Smith v. Doe*, 538 U.S. 84 (2004) where the Supreme Court found the Alaska sex offender registration and notification law did not violate the Ex Post Facto Clause. *Id.* at 105-6. The statute in question was indisputably retroactive, as it applied to sex offenders convicted before the statute's enactment. *Id.* at 91. However, a statute of this kind only violated the Ex Post Facto Clause if the legislature intended to punish, and not merely to establish "civil proceedings." *Id.* at 92 (quoting *Ks. v. Hendricks*, 521 U.S. 346, 361 (1997)). If the legislature's intent was found to impose a civil regulatory system, the statute required further examination to determine whether the scheme was "so punitive either in purpose or effect as to negate [the state's] intention 'to deem it 'civil.' " *Id.* at 92 (quoting *U.S. v. Ward*, 448 U.S. 242, 248-249 (1980)). The Court noted "only the clearest proof" would counteract legislative intent and deem a statute's intended purpose morphed from a "civil remedy into a criminal penalty." *Id.* at 92 (citing *Hudson v. U.S.*, 522 U.S. 93, 100 (1997) (quoting *Ward*, 448 U.S. at 249)); see also *Hendricks*, 521 U.S. at 361; *U.S. v. Ursery*, 518 U.S. 267, 290 (1996); *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984). In finding the statute was not punitive in effect, the Court relied upon the statute's "rational connection to a nonpunitive purpose." *Smith*, 538 U.S. at 102 (citing *Ursery*, 518 U.S. at 290). In this case, the purpose was to further public safety through alerting the public of sex offenders in their neighborhoods, especially in light of the reportedly high rate of recidivism among sex offenders and their overall "dangerousness as a class." *Id.* at 103.

288. *Juvenile Male*, 581 F.3d at 979.

289. *Id.*

290. *Id.* at 978.

291. *Id.* at 979.

292. *Id.*

293. *Juvenile Male*, 581 F.3d at 978.

294. *Id.* at 979.

295. *Id.* at 983-4.

296. *Id.* at 986 (citing district judge at juvenile's revocation hearing stating, "[T]his is a juvenile proceeding. Consequently, it is closed to the public.").

297. *Id.* at 988.

298. *Juvenile Male*, 581 F.3d at 989.

299. *Id.* at 986.

300. *Id.* (emphasis omitted) (citing 18 U.S.C.A. § 5038(a) (West 2009)) (stating, "Throughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to

to the public.³⁰¹ Rather, it made previously confidential information public, subjecting juveniles to sex offender registry's irreparable repercussions, an injury previously withheld from them.³⁰²

2. SORNA's Impact on Sexting Offenses

SORNA is another example of expansive moral legislation with unforeseen consequences for minors convicted of sexting offenses.³⁰³ While the goal of creating a national sex offender registry is necessary to allow, "parents to protect their children from sex offenders that might be in their neighborhoods,"³⁰⁴ narrow tailoring is required to ensure it does not victimize its intended protected class.³⁰⁵ As *Juvenile Male* explains, the intent of criminal proceedings involving minors is rehabilitation, not disproportional punishment.³⁰⁶ Requiring teens to register as sex offenders for a large portion of their adult lives for teen sexting offenses clearly punishes them for immature, sometimes harmless, decisions made during their formative years.³⁰⁷ Furthermore, even if teens are adjudicated in juvenile court and therefore most likely exempt from registration,³⁰⁸ their juvenile records may become public, thus stigmatizing them long after they have reached the age of majority and served their punishment.³⁰⁹

While SORNA's intentions are worthy, its incidental consequences have proved far-reaching.³¹⁰ As Vermont has foreseen, legislative amendment at the state level is necessary to ensure teens charged with sexting offenses are not required to register as sex offenders.³¹¹ A federal blanket provision,³¹² which allows one person the ability to decide such imperative decisions as retroactive application without so much as guidelines,³¹³ is not capable of accounting for the individualized effects of sex offender registry.³¹⁴ Therefore, states must amend their child pornography laws to shield minors charged with sexting offenses from the irreversible effects of expansive sex offender

unauthorized persons.").

301. *Id.* at 987.

302. *Id.*

303. See Pub. L. No. 104-193; *supra* notes 195-208 and accompanying text (detailing the intentions behind charging teens with sexting offenses).

304. 2006 U.S.C.C.A.N. at S36.

305. See *supra* notes 209-11 and accompanying text; see also *A.H.*, 949 So. 2d at 239 (Padovano, J., dissenting).

306. See *U.S. v. Juvenile Male*, 581 F.3d 977, 982 (9th Cir. 2009), 581 F.3d at 989.

307. See Pub. L. No. 109-248, § 111 (requiring registration for twenty-five years); see *Miller*, 605 F. Supp. 2d 634. The teens involved in the injunction would have been in their forties by the time they were no longer required to register as a sex offender. *Id.*

308. See *supra* notes 272-6 (explaining minors adjudicated delinquent will most likely not be required to register for a child pornography offense).

309. See *Juvenile Male*, 581 F.3d at 979 (explaining that making previously private juvenile records public serves to punish a juvenile long after they have reached adulthood and have families of their own).

310. See Yung, *supra* note 283 (detailing the numerous constitutional challenges to SORNA in the mere three years since its enactment).

311. S. 125, Reg. Sess. (Vt. 2009) (citing SORNA's enactment as the impetus for decriminalizing teen sexting in limited circumstances).

312. See 42 U.S.C.A. §§ 16901-16917.

313. See *Juvenile Male*, 581 F.3d at 982 (citing 28 C.F.R. § 72.3).

314. See *id.* (explaining the punitive effects retroactive application had on one man, effects the attorney general most likely did not have in mind when he decided SORNA should be retroactive in application).

registry laws.³¹⁵

D. The Form Amendments Should Take

1. “Romeo and Juliet” Exceptions to Statutory Rape

Charging teens with statutory rape for consensual teen sex draws numerous similarities to teen sexting offenses.³¹⁶ Just as every state regulates child pornography,³¹⁷ every state regulates sexual intercourse between unmarried people³¹⁸ below a certain age, commonly referred to as statutory rape.³¹⁹ Lawmakers generally deem these individuals legally incapable of consent.³²⁰

Initially, statutory rape laws reflected the premise that a woman’s premarital chastity was a valuable commodity worthy of legal protection.³²¹ Accordingly, these laws were gender specific; they only targeted male activity as criminal.³²² Modern laws regulating consensual teen sex evolved from a desire to protect a property interest³²³ into the belief that statutory rape laws necessarily regulated teen sexual behavior.³²⁴ Lawmakers cited the many risks accompanying adolescent sexual behavior as bolstering the necessity of these laws.³²⁵ These risks ranged from the intangible harms surrounding inexperienced sexual interactions, such as coercion or abuse, to tangible effects, such as the proliferation of teen pregnancy.³²⁶

A study published in 1992 by Professor Michael Males indicated that an alarmingly high number of teen mothers gave birth to babies fathered by adult men.³²⁷ The Alan Guttmacher Institute replicated this study on a larger scale, finding sixty-five percent of teen mothers bore babies to fathers at least twenty years old.³²⁸ This study

315. See *Juvenile Male*, 581 F.3d at 981-982 (detailing the expansive provisions and their lasting and punitive effects on juveniles).

316. See generally Siji A. Moore, Comment, *Out of the Fire and Into the Frying Pan: Georgia Legislature’s Attempt to Regulate Teen Sex Through the Criminal Justice System*, 52 HOW. L.J. 197 (2008) (discussing Georgia’s attempt to regulate consensual teen sexual interactions through criminal sanctions). States are similarly using sexting offenses to regulate teen sexual interactions. See notes 195-208 and accompanying text.

317. Smith, *supra* note 60, at 513.

318. CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 1 (2004).

319. Moore, *supra* note 316, at 208.

320. COCCA, *supra* note 318, at 1.

321. *Id.* at 11.

322. *Id.* at 9, 18-9.

323. *Id.* at 11.

324. Meredith Cohen, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Law*, 16 J.L. & POL’Y 717, 731 (2008); see Wendy Koch, *Defining a Sex Predator, For Life*, USA TODAY, July 25, 2007, at 3A.

325. Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 704-5 (2000).

326. *Id.* at 705.

327. *Id.* (citing Mike Males, *Adult Liaison in the “Epidemic” of “Teenage” Birth, Pregnancy and Venereal Disease*, 29 J. SEX RESEARCH 525, 527-44 (1992)).

328. COCCA, *supra* note 318, at 25; see also Oberman, *supra* note 325, at 705 (citing Jacqueline E. Darroch et. al., *Age Differences Between Sexual Partners in the United States*, 31 FAM. PLAN. PERSP. 160, 163 (1999); Rigel Oliveri, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 504-5 (2000) (stating the term “teen” is vague, and recent studies have shown nearly two-thirds of teen mothers are eighteen or nineteen years old, and thus do not qualify as “victims” under statutory rape laws)).

also demonstrated that often the younger the mother, the older the father.³²⁹ Despite subsequent studies showing nearly sixty percent of these teen mothers as eighteen or nineteen years old with partners aged twenty-one or twenty-two,³³⁰ the Alan Guttmacher Institute findings fueled the fire for the strict enforcement of statutory rape laws.³³¹ Lawmakers and individuals believed a tougher stance on statutory rape prosecution, such as heightened penalties for consensual teen sex, would lower teen pregnancy rates.³³²

The concerns surrounding the moral and financial implications attributed to rampant teen pregnancy led to legislation aimed at promoting statutory rape convictions in the mid-nineties.³³³ One year after the Alan Guttmacher findings, Congress looked to welfare reform as a means of enticing states into enforcing statutory rape laws.³³⁴ As previously mentioned,³³⁵ Congress enacted the Welfare Reform Act in 1996,³³⁶ simultaneously establishing Temporary Assistance to Needy Families (TANF), a block grant to the states.³³⁷

In addition to providing funding for educational programs positing the immoral and unacceptable nature of premarital sex,³³⁸ the Welfare Reform Act also targeted the financial burdens and moral implications accompanying out of wedlock teen births.³³⁹ Every state was required to submit its individual plan reducing illegitimate teen pregnancy and specifically required to provide “education and training on the problem of statutory rape.”³⁴⁰ States could potentially receive bonuses of up to twenty-five million dollars in TANF funding each year if teen pregnancy decreased.³⁴¹ Shortly after the Welfare Reform Act’s passage, ten states poured millions of dollars into targeting teen sex through increased statutory rape prosecutions, “explicitly intertwining the moral and economic bases of statutory rape laws.”³⁴² This increased interest in statutory rape prosecution garnered mixed reviews,³⁴³ but it was not until a 2006 Georgia case, *Wilson v. State*,³⁴⁴ that teen sex prosecution’s far-reaching implications were brought into focus.³⁴⁵

On December 31, 2003, seventeen-year-old homecoming king Genarlow Wilson

329. COCCA, *supra* note 318, at 25.

330. *Id.*

331. Oberman, *supra*, note 325, at 706.

332. COCCA, *supra* note 318, at 25.

333. *Id.* at 26.

334. *Id.*

335. See *supra* notes 196-201 and accompanying text (explaining the Welfare Reform Act’s connection to the purpose of “sexting” charges).

336. COCCA, *supra* note 318, at 26 (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105).

337. *Id.* (citing §§ 101-116).

338. *Finer, supra* note 196, at 74.

339. COCCA, *supra* note 318, at 26.

340. *Id.* (quoting §§ 402(a)(1)(A)(v), 402(a)(1)(A)(vi), 110 Stat. 2105).

341. *Id.* (citing §§ 403(2)(A), 403(2)(B)) (stating “[e]ach state shall be entitled to receive from the Secretary a bonus each year for which the state demonstrates a net decrease in out-of-wedlock births,” totaling up to \$25,000,000).

342. *Id.*

343. *Id.* at 26-7.

344. *Wilson v. State*, 631 S.E.2d 391 (Ga. Ct. App. 2006).

345. Koch, *supra* note 324 (discussing debate sparked by *Wilson* opinion among state legislatures).

attended a friend's New Year's Eve party held at a hotel in Douglasville, Georgia.³⁴⁶ Wilson, along with several of his male classmates, received oral sex from a fifteen-year-old classmate, Tracy.³⁴⁷ After investigating the incident and recovering a videotape of various sexual encounters that took place at the party, police officers arrested Wilson and five other seventeen-year-old males for a variety of sexual offenses.³⁴⁸ Wilson's charge was aggravated child molestation resulting from oral sex he engaged in with Tracy.³⁴⁹ At the time of Wilson's arrest, Georgia law classified sex, including oral sex, with any person under the age of sixteen as aggravated child molestation, regardless of the age difference between the two individuals.³⁵⁰ This charge carried a statutory minimum of ten years imprisonment, and required defendants to register as sex offenders.³⁵¹

Wilson decided to risk trial rather than submit to registration, while the other young men accepted plea bargains.³⁵² The jury found that the voluntary act of oral sex by a person over the age of sixteen with someone under the age of sixteen, regardless of consent,³⁵³ satisfied the elements of aggravated sexual assault.³⁵⁴ The jury sentenced Wilson to ten years in prison and required his registration as a sex offender.³⁵⁵ Wilson's case, along with the sentencing of his classmate Marcus Dixon,³⁵⁶ brought national attention to Georgia's teen sex laws and placed pressure on its legislature to amend its aggravated child molestation law.³⁵⁷ Accordingly, Georgia amended its law reducing Wilson's crime to a misdemeanor,³⁵⁸ but failed to make the amendment retroactive.³⁵⁹ Wilson spent two years in jail before the Georgia Supreme Court finally authorized his release in 2007, based on the premise that his punishment was cruel and unusual.³⁶⁰

In response to Wilson's punishment³⁶¹ and the national crackdown on statutory rape,³⁶² several states enacted legislation eliminating the prosecution of consensual teen

346. Moore, *supra* note 316, at 197 (citing Wright Thompson, *ESPN.com The Magazine: Outrageous Injustice*, <http://sports.espn.go.com/espn/eticket/story?page=Wilson> (last accessed Oct. 17, 2009)).

347. *Id.* at 198.

348. *Id.* at 198-9.

349. *Id.* at 199.

350. *Id.* (citing GA. CODE ANN. § 16-6-4(c) (West 2009)).

351. Moore, *supra* note 316, at 199 (citing § 16-6-4(c)).

352. *Id.* at 200 (citing GA. CODE ANN. § 42-1-15 (West 2006) (stating this law would have prevented Wilson from living with his little sister as sex offenders were prohibited from living within "1,000 ft. of any child care facility, church, or area where minors congregate")).

353. *Id.* at 201. Moore explains consent was an issue at trial, but there was considerable evidence Michelle consented to the sexual acts she committed. *Id.*

354. *Id.*

355. Moore, *supra* note 316, at 201 (citing *Wilson v. State*, 631 S.E.2d 391, 392 (Ga. Ct. App. 2006)); Kathy Gill, *Injustice in Georgia: The Case of Genarlow Wilson*, <http://uspolitics.about.com/b/2007/01/26/injustice-in-georgia-the-case-of-genarlow-wilson.htm> (last accessed Oct. 17, 2009) (stating, "At the same time that Wilson was being sentenced to ten years in prison, down the hall in the courthouse, a twenty-seven-year-old teacher got a slap on the wrist (probation) for having sexual intercourse with a sixteen-year-old male student").

356. Moore, *supra* note 316, at 201; see *Dixon v. State*, 596 S.E.2d 147 (Ga. 2004) (sentencing Dixon to ten years imprisonment for having sex with a girl two years and three months younger than himself).

357. Moore, *supra* note 316, at 201.

358. *Id.* (citing GA. CODE ANN. § 16-6-4 (West 2008)).

359. *Id.*

360. *Id.* at 202.

361. Wendy Koch, *States Ease Laws That Punish Teens for Sex with Minors*, USATODAY.COM, http://www.usatoday.com/news/nation/2007-07-24-teen-sex-offenders_N.htm (last visited Feb. 2, 2011).

362. *Id.*; see *supra* notes 250-315.

sex.³⁶³ Proponents of this legislation believed tough laws regulating teen sex needed amendment to focus on predators, not teenagers.³⁶⁴ The belief that juvenile offenders were less likely than adult sex offenders to commit another offense and were more susceptible to rehabilitation, was another basis for amending laws regulating teen sex.³⁶⁵

A common misconception concerning statutory rape is that states strictly define only one age of consent, meaning intercourse with any individual below this statutorily prescribed age is illegal, without regard to any other factors.³⁶⁶ This was the prevailing view at one point.³⁶⁷ Under this structure, even if the male is the same age as the female, or younger, and they are both below the age of consent, prosecution for felony statutory rape is a likely outcome.³⁶⁸

In actuality, this represents a very small minority of state statutory rape laws.³⁶⁹ Statutory rape laws no longer solely criminalize male conduct.³⁷⁰ Furthermore, the vast majority of states consider various factors such as “age differentials, minimum age of the victim, and minimum age of the defendant,” as mitigating factors.³⁷¹ Lawmakers and prosecutors commonly refer to these mitigating circumstances as “Romeo and Juliet” exceptions to statutory rape.³⁷² “Romeo and Juliet” laws mitigate penalties or completely exculpate consensual teen activities when both are close in age, yet one is below the legal age of consent.³⁷³ Thirty-nine states use “Romeo and Juliet” exceptions to decriminalize punishment for voluntary sexual interactions among teens of similar age and maturity.³⁷⁴ For example, a state will typically set a minimum age for a possible defendant, commonly sixteen or seventeen,³⁷⁵ and specify the behavior is not criminal if the defendant is no more than a certain number of years older than the victim, typically between two and four years.³⁷⁶ Additionally, forty-five states and Washington D.C. mitigate at least the punishment for statutory rape from a felony to a misdemeanor based on the age span between the two teens.³⁷⁷

363. Koch, *supra* note 361 (citing Texas, Oklahoma, Arizona, Florida, Oregon, Connecticut, and Indiana as states that had mitigated punishment for consensual sexual acts among teens in response to *Wilson* and *SORNA*).

364. *Id.*

365. *Id.* (citing Allison Taylor, executive director of the Texas Council on Sex Offender Treatment).

366. ASAPH GLOSSER, KAREN GARDINER & MIKE FISHMAN, *STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS* 7 (2004) available at <http://aspe.hhs.gov/hsp/08/SR/StateLaws/> (last visited Oct. 11, 2009).

367. Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 225 (2008).

368. *Id.*

369. GLOSSER ET AL., *supra* note 366, at 7.

370. COCCA, *supra* note 318, at 22.

371. GLOSSER ET AL., *supra* note 366, at 7.

372. Higdon, *supra* note 367, at 226.

373. *Id.* at 225-6.

374. GLOSSER ET AL., *supra* note 366, at 7. The eleven states without “Romeo and Juliet” exceptions are: California, Georgia, Idaho, Illinois, Kansas, Kentucky, Massachusetts, Michigan, New Hampshire, New York, and Wisconsin. *Id.* at 6-7.

375. *No Easy Answers: Sex Offender Laws in the US*, HUMAN RIGHTS WATCH (Sept. 11, 2007), <http://www.hrw.org/en/node/10685/section/8>.

376. Cohen, *supra* note 324, at 734.

377. *Id.* at 734, n.119. These statutes are: ALA. CODE § 13A-6-62(a)(1) (West 2009); ALASKA STAT. §§

Reflective of the current status of statutory rape laws, in which the vast majority do not criminalize consensual teen sex,³⁷⁸ most Americans would agree that consensual teen sex is not worthy of criminal sanction.³⁷⁹ The fact that victimization is not a product of consensual teen sex explains why many no longer consider criminal sanctions necessary.³⁸⁰ Comparably, a teen that takes a nude, or semi-nude, picture of themselves and sends it to their significant other is not victimized by their own conduct.³⁸¹ Likewise, this conduct requires decriminalization.³⁸²

As discussed previously, the impetus for charging teens with sexting offenses is deterrence of teen sexual encounters, as evidenced through The Welfare Reform Act.³⁸³ The Welfare Reform Act similarly spurred zealous enforcement of state statutory rape laws in order to receive large amounts of state funding, thus furthering the government's goal of discouraging teen pregnancy and teen sex.³⁸⁴ It took the cases of Genarlow Wilson³⁸⁵ and others like his³⁸⁶ to make states realize that punishment for teen sex victimized the *teen*, not the sex itself.³⁸⁷ The overwhelming majority of state legislatures determined the need to protect teens from excessive punishment surpassed their desire to

11.41.434(a), 11.41.436(a), 11.41.438(a), 11.41.440(a)(1) (2009); ARIZ. REV. STAT. ANN. § 13-1407F (2009); ARK. CODE ANN. §§ 5-14-110(a)(2)(B), 5-14-125(5)(B)(i), 5-14-126(2)(B), 5-14-127(a) (2009); CAL. PENAL CODE § 261.5(b)(c) (West 2009); COLO. REV. STAT. § 18-3-402(1)(d) (2009); CONN. GEN. STAT. §§ 53a-70(a), 53a-71(a)(1) (2009); DEL. CODE ANN. tit. 11, §§ 770(a)(2), 771(a)(1), 772(a)(2)g, 773(a)(5) (2009); D.C. CODE §§ 22-3008, 22-3009 (2009); FLA. STAT. § 794.05(1) (2009); GA. CODE ANN. § 16-6-3(b)(c) (2009); HAW. REV. STAT. §§ 707-730(1)(c)(i), 707-732(1)(c)(i) (2009); IDAHO CODE ANN. § 18-1508A(1) (2009); 720 ILL. COMP. STAT. 5/12-14.1(a)(1) (2009); IND. CODE § 35-42-4-9 (2009); IOWA CODE ANN. §§ 709.4(2)(c)(4), 709.12(4) (West 2009); KY. REV. STAT. ANN. §§ 510.050(1)(a), 510.060(1)(a), 510.130(1)(b)(c) (West 2009); LA. REV. STAT. ANN. § 14:43.1(A) (2008); ME. REV. STAT. ANN. tit. 17-A §§ 254, 255-A, 260 (2009); MD. CODE ANN. CRIM. LAW §§ 3-304(a)(3), 3-306(a)(3), 3-307(a)(3)-(5), 3-308(b)(2)(3) (West 2009); MICH. COMP. LAWS § 750.520e(1)(a) (2009); MINN. STAT. §§ 609.342(2009); MISS. CODE ANN. § 97-3-65 (West 2009); MO. REV. STAT. §§ 566.034, 566.064 (2009); MONT. CODE ANN. §§ 45-5-502(3), 45-5-503(3)(a) (2008); NEB. REV. STAT. § 28-320.01(1) (2009); NEV. REV. STAT. ANN. §§ 200.368, 200.364 3(b) (West 2008) (amended by 2009 Nev. Stat. Ch. 68); N.H. REV. STAT. ANN. §§ 632-A:4 (1) (2009); N.J. STAT. ANN. § 2C:14-2 (West 2009); N.M. STAT. ANN. § 30-9-11(G)(1) [?] (West 2009); N.Y. PENAL LAW §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50 (McKinney 2009); N.C. GEN. STAT. §§ 14-27.2(a)(1), 14-27.4(a)(1), 14-27.7A (2009); N.D. CENT. CODE §§ 12.1-20-03, 12.1-20-07 (2009); OHIO REV. CODE ANN. § 2907.04 (LexisNexis 2009); OKLA. STAT. tit. 21, § 1112 (2009); OR. REV. STAT. § 163.345 (2009); 18 PA. CONS. STAT. ANN. §§ 3122.1, 3126(a)(8) (West 2009); R.I. GEN. LAWS § 11-37-6 (2008); S.D. CODIFIED LAWS § 22-22-7 (2009); TENN. CODE ANN. § 39-13-506(a) (2009); TEX. PENAL CODE ANN. §§ 21.11(b), 22.011(e) (West 2009); UTAH CODE ANN. §§ 76-5-401(3), 76-5-401.1(2)(3), 76-5-402.2(2) (LexisNexis 2009); VA. CODE ANN. § 18.2-63 (2009); WASH. REV. CODE §§ 9A.44.073(1), 9A.44.076(1), 9A.44.079(1), 9A.44.083(1), 9A.44.086(1), 9A.44.089(1) (2009); W. VA. CODE ANN. §§ 61-8B-3(a)(2), 61-8B-5(a)(2), 61-8B-7(a)(3), 61-8B-9(b) (West 2009); WYO. STAT. ANN. §§ 6-2-303(a)(v), 6-2-304(a)(i). *Id.*

378. See *Finer, supra* note 196, at 74 (explaining a minority of adults believe pre-marital teen sex is inherently wrong).

379. See *supra* notes 369-77 (explaining the current status of statutory rape laws generally do not criminalize consensual teen sex).

380. See *Smith, supra* note 60, at 526 (stating many believe voluntary teen sex is generally not worthy of punishment). This is presumably because the teens are not deemed capable of exploiting themselves, due to their similar levels of maturity. See *id.*

381. *Id.* at 529 (explaining minors who voluntarily engage in producing sexual images of themselves should not be considered victimized in any way).

382. See *id.*

383. See *supra* notes 195-201 (citing Pub. L. No. 104-193 § 912, 110 Stat. 2105).

384. See *supra* notes 339-45.

385. See *Wilson v. State*, 631 S.E.2d 391 (Ga. Ct. App. 2006).

386. See *Dixon v. State*, 596 S.E.2d 147 (Ga. 2004).

387. Moore, *supra* note 316, at 202 (explaining Wilson's punishment was the catalyst for amending Georgia's laws criminalizing consensual teen sex).

deter teen sex through the enforcement of statutory rape laws.³⁸⁸ Hopefully, the same realization, as manifested through cases such as *Miller*, will force every state legislature to follow the lead of the few states that have addressed sexting and amended their child pornography laws.³⁸⁹

Statutory rape has had hundreds of years to evolve and conform to the current state of societal norms concerning teen sex.³⁹⁰ Sexting is an extremely new phenomenon by any standard.³⁹¹ Accordingly, child pornography statutes should draw guidance from statutory rape statutes and similarly take into account the age of the producer of the image when criminalizing conduct.³⁹²

2. A Guideline for States Based on “Romeo and Juliet” Exceptions and the Recent Actions of States

To ensure the intended purpose of child pornography laws remains intact, the amendments must consider multiple factors.³⁹³ The age of the *producer* of the image most certainly should be a factor in determining criminal liability for the production and possession of child pornography.³⁹⁴ Analogously to statutory rape, if the producer of the image is below the age of eighteen, production and possession of the image does not justify criminalization.³⁹⁵

As the dissent in *A.H. v. State* explains, when criminalizing the *dissemination* of the image, the teen producer’s intent should be a controlling factor in assigning criminal sanctions to the conduct.³⁹⁶ If the teen producing the sexting image sends it to only one person, namely another teen of similar maturity level, then neither the dissemination *nor* the production of the image warrants criminal penalty.³⁹⁷ However, a teen like Jesse Logan’s boyfriend, who disseminated an image he did not produce to a large group of people, deserves criminal punishment for his actions.³⁹⁸ This conduct is worthy of criminal punishment because the victimization and exploitation of the minor subject resulting from this type of behavior is the precise consequence child pornography laws were enacted to prevent.³⁹⁹

The recent legislative amendments in response to sexting are useful guidelines to

388. See *supra* notes 369-77 (demonstrating the vast majority of states do not criminalize, or mitigate punishment, if the two teens are similar in age).

389. See *Miller*, 605 F. Supp. 2d 634 (M.D. Pa. 2009) (detailing the unsubstantiated claims of a morally driven prosecutor).

390. COCCA, *supra* note 318, at 11.

391. See *Miller*, 605 F. Supp. 2d 634. This case from March 2009 is currently the only widely reported trial decision concerning sexting. *Id.*

392. See *supra* notes. 372-3.

393. See *supra* notes. 18-59 (explaining the intent behind child pornography laws is to impede coercion and abuse of children).

394. See GLOSSER ET AL., *supra* note 366, at 7 (demonstrating that most states take the age of the participants into account when determining whether criminal sanctions are appropriate for teen sexual behavior).

395. See Higdon, *supra* note 367, at 225-6.

396. See *A.H. v. State*, 949 So. 2d 234, 239-41 (Fla. Dist. Ct. App. 2007) (Padovano, J., dissenting).

397. See *id.*

398. See Celizic, *supra* note 143.

399. See *id.* (detailing that Jesse was not victimized until *after* the image was produced and sent by her boyfriend to numerous female classmates; thus causing her daily shame and embarrassment).

states in many aspects.⁴⁰⁰ Legislation by states such as Utah and Ohio, downgrades punishment from a felony to a misdemeanor based on the age of the person either producing or disseminating the image.⁴⁰¹ Although positive steps, such legislation fails to differentiate between the intent of the producer and the intent of the disseminator.⁴⁰² Nebraska's affirmative defense decriminalizing minor possession of an image if the image depicts only one child, is not coerced, and is not disseminated, more adequately assigns the appropriate level of punishment based on the intent of teens.⁴⁰³ Vermont's sexting legislation moving teen sexting offenses to juvenile courts is another necessary change in light of SORNA's expansive reach.⁴⁰⁴

In sum, the teen producer of a sexting image is not worthy of criminal punishment if the image is voluntarily produced, sent to one or no persons, and depicts solely the teen producer.⁴⁰⁵ If the state decides to punish the teen producer, a separate child pornography offense adjudicated in juvenile court is necessary to bolster the likelihood the teen will not face sex offender registration.⁴⁰⁶ On the contrary, a teen who did not produce the sexting image and subsequently sent it to multiple people in an effort to exploit and ridicule the subject is worthy of whatever punishment the state deems fit, due to the abuse and irreversible harm this conduct inflicts on the teen subject.⁴⁰⁷

IV. CONCLUSION

Sexting provides a telling look into the private, sexual lives of teens.⁴⁰⁸ This insight disturbs both parents and law enforcement officers alike.⁴⁰⁹ Sexting displays a reckless, possibly immoral, attitude towards sex among today's youth.⁴¹⁰ However, the underlying beliefs pertaining to the sexuality of the teen producer do not require rectification by the state.⁴¹¹ Parents are the archetypes of sexual mores and behavior for their teen children.⁴¹² Consequently, teen education concerning the appropriateness of sexual behavior should primarily be delegated to parents in the home.⁴¹³ Child pornography laws are not intended as a state-endorsed vehicle to educate teens concerning the proper role of sex in teen life.⁴¹⁴ The state's decision to charge teens for producing sexually suggestive images under statutes designed to mitigate coercive acts of adults, shows the state's motivation is regulation of teen sexual interactions, not

400. See Greenberg, *supra* note 156.

401. See H. 14, 2009 Gen. Sess. (Utah 2009); S. 103, 128th Gen. Assemb. (Ohio 2009).

402. See *id.*

403. See Leg. 97, 101st Leg., 1st Reg. Sess. (Neb. 2009).

404. See S. 125, Reg. Sess. (Vt. 2009).

405. See *supra* notes 394-9.

406. See *supra* notes 270-6.

407. See *supra* notes 18-59 (explaining the intent of child pornography laws is mitigation of child abuse).

408. See Johnson, *supra* note 89 (discussing the parents and lawmakers concerns in recent years over sexting).

409. *Id.*

410. See generally Smith, *supra* note 60 (discussing the moral issues concerning "self-produced teen pornography" and the necessity to distinguish this conduct from criminal conduct).

411. See *id.* at 529.

412. Shtarkshall et al., *supra* note 211, at 116.

413. *Id.*

414. See *supra* notes 18-59 and accompanying text (discussing the statutes' intent is to rectify child abuse).

diminishment of child abuse. This improper motivation, coupled with the far-reaching and irreversible effects of sex offender registry, demonstrate the necessity of amendment to child pornography laws to reflect the age and intent of the teen producer.

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